(25,207)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 427.

VICTOR HERBERT, HARRY B. SMITH, ET AL., PETITIONERS,

vs.

THE SHANLEY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 14, 1916.

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a United States Circuit Court of Appeals for the Second Circuit.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DE GRESAC MAUREL, and G. SCHIRMER, Inc., Complainants-Appellants,

against

THE SHANLEY COMPANY, Defendant-Appellee.

TRANSCRIPT OF RECORD.

Appeal from the United States District Court for the Southern District of New York.

1 *Equity Subpœna.*

The President of the United States of America to The Shanley Company, Greeting:

You are hereby commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in Equity, by Victor Herbert, Harry B. Smith, Robert B. Smith, Fred de Gresac Maurel and G. Schirmer, Inc., and to further do and receive what the said Court shall have considered in this behalf; and this you are not to omit under the penalty on you of Two hundred and fifty dollars ($250).

Witness, Honorable Charles M. Hough, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 14th day of April, in the year one thousand nine hundred and fifteen and of the Independence of the United States of America the one hundred and thirty-ninth.

ALEX. GILCHRIST, JR., *Clerk.*

NATHAN BURKAN,
Complainants' Sol'r.

The defendant is required to file its answer or other defense in the above cause in the Clerk's office of this Court, on or before the twentieth day after service hereof excluding the day of said service;
2 otherwise the bill aforesaid may be taken pro confesso.

[SEAL.] ALEX. GILCHRIST, JR., *Clerk.*

Filed, U. S. D. C.—S. D. of N. Y.—April 15, 1915.

Affidavit of Service of Subpœna.

I hereby certify that on the 14th day of April, 1915, at the City of New York, in my district, I served the within subpœna in equity

upon the within named defendant, The Shanley Company by exhibiting to Francis Gilbert, as a member of the firm of Gilbert Lauterstein and Gilbert, attorneys for said defendant, at No. 43 Exchange Place, N. Y. City, as per admission of service endorsed hereon, the within original and at the same time leaving with him a copy thereof.

THOMAS D. McCARTHY,
United States Marshall,
Southern District of New York.

Dated, April 15, 1915.
Filed, U. S. D. C.—S. D. of N. Y.—April 15, 1915.
Admission of service on back of original subpœna.
Service of the within subpœna is hereby accepted.
April 14, 1915.

GILBERT, LAUTERSTEIN & GILBERT,
By FRANCIS GILBERT,
Attorneys for Defendant.

3 *Bill of Complaint.*

District Court of the United States, Southern District of New York.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DE GRESAC MAUREL, and G. SCHIRMER, Inc., Complainants,
against
THE SHANLEY COMPANY, Defendant.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

I. That your orators Victor Herbert, Harry B. Smith and Robert B. Smith are residents and citizens of the Borough of Manhattan, City of New York, in the Southern District of New York; that your orator Fred de Gresac Maurel is a resident and citizen of the Republic of France; that your orator G. Schirmer, Inc., at all of the times hereinafter mentioned was and still is a corporation duly organized under the laws of the State of Virginia, having its principal place of business in the Borough of Manhattan, City of New York, Southern District of New York.

II. That at all of the times hereinafter mentioned your orator G. Schirmer, Inc., was engaged in the business of publishing operas, musical compositions and other works.

4 III. Upon information and belief, that the defendant was at all of the times hereinafter mentioned and still is a business corporation organized and existing under the Business Corporations Law of the State of New York, and that it was organized for the purpose of conducting and maintaining a restaurant and place of public accommodation and entertainment for profit; and that it

had and has its principal place of business in the Borough of Manhattan, City of New York, in the Southern District of New York.

IV. That at all of the times hereinafter mentioned the defendant conducted and maintained and still conducts and maintains a restaurant and place of public accommodation, refreshment and entertainment for gain on Broadway, between 43rd and 44th Streets, in the Borough of Manhattan, City of New York.

V. That prior to the 17th day of March, 1913, your orator Fred de Gresac Maurel wrote, composed and originated a new and original scenario of a comic opera, and before the 17th of March, 1913, your orator Harry B. Smith adapted the said scenario and developed and completed the same and made the same suitable for representation as a book of a comic opera.

That prior to the 17th day of March, 1913, your orator Robert B. Smith, wrote and originated new and original lyrics as part of said opera to be sung and rendered as part of said opera, and prior to said 13th day of March, 1913, your orator Victor Herbert, composed and set original music to said book and lyrics of said opera, and the said scenario, book, lyrics and music constituted a dramatico-
5 musical composition or comic opera for which work your orators Fred de Gresac Maurel, Harry B. Smith, Robert B. Smith and Victor Herbert, adopted the title "Sweethearts."

VI. That thereafter and on the 2nd day of April, 1913, your orator G. Schirmer, Inc., having been duly authorized to do so, copyrighted the said vocal score of the said dramatico-musical composition entitled "Sweethearts" by publishing the same and offering the same to the general public in the City of New York, on the 2nd day of April, 1913, with the following notice of copyright on the title page, to wit: "Copyright 1913 by G. Schirmer, Inc." That the right to copyright said vocal score was granted to your orator G. Schirmer, Inc., subject to the condition that the performing right shall belong to your orators Victor Herbert, Harry B. Smith, Robert B. Smith and Fred de Gresac Maurel who are the sole owners of the performing rights therein and of the right to authorize the public performance thereof.

VII. That after the publication of said vocal score of the dramatico-musical composition under the title "Sweethearts" with notice of copyright as aforesaid, your orator G. Schirmer, Inc., deposited in the office of the Register of Copyrights, Washington, District of Columbia, two complete copies of the best edition then published and paid to the Register of Copyrights the fee required by law for the registration of said work, and said work was duly registered by said Register of Copyrights on the 4th day of April, 1913.

That thereafter the Register of Copyrights issued to your
6 orator G. Schirmer, Inc., a certificate of copyright registration of the said vocal score of said dramatico-musical composition, in pursuance to the copyright law as more fully appears by the certificate of copyright hereto annexed and marked Exhibit "A," and made a part hereof.

VIII. That since the said 2nd day of April, 1913, the vocal score of said dramatico-musical composition has been published by your

orator G. Schirmer, Inc., and there has been inscribed on the title page of each copy thereof published or offered for sale by authority of your orators G. Schirmer, Inc., or of any of your orators the copyright notice required by law in the following words: "Copyright 1913 by G. Schirmer, Inc."

IX. That the vocal number "Sweethearts," consisting of words and music was written and composed as a part of said dramatico-musical composition and is a link of the dramatic action of the said dramatico-musical composition, and the said number is a component part of the said dramatico-musical composition and is contained in the said book and vocal score of the said dramatico-musical composition.

X. That copyright of the book of said dramatico-musical composition was secured by your orator Harry B. Smith on behalf of himself and of your orators Victor Herbert, Fred de Gresac Maurel and Robert B. Smith, by depositing with Claim of Copyright one complete copy of such book in the office of the Register of Copyrights, Washington, District of Columbia, on the 18th day of April, 1913.

That the said book has not been published, publicly distributed or reproduced in copies for sale.

7 That a certificate of copyright registration of the said dramatico-musical composition in pursuance of the copyright law was issued to your orator Harry B. Smith by the Register of Copyrights as more fully appears by the certificate of copyright hereto annexed and marked Exhibit B and made a part hereof.

XI. That prior to the 17th day of March, 1913, your orators Victor Herbert, Harry B. Smith, Robert B. Smith and Fred de Gresac Maurel caused Werba & Luescher, theatrical managers and producers, to publicly perform and represent upon the public stage the said dramatico-musical composition. That said Werba & Luescher did in preparation for the public performance and representation of the said opera make an extensive production therefor, consisting of sceneries, costumes, accessories and other paraphernalia engaged artists and entered into booking contracts for the public performance and representation thereof in a theatre in New York City.

That the said Werba & Luescher gave the first performance of the said opera on March 17th, 1913, and continued the performances thereof for a long time, and the same has been a great financial and artistic success.

XII. That the said vocal number "Sweethearts" was publicly sung, rendered and performed in and as part of the public performances and representation of the said opera "Sweethearts" and the said number was an important part of the said opera and is the leading vocal number of the said opera, and the success and popularity of the said opera "Sweethearts" is largely due to the popularity and value of the said musical number.

8 XIII. That the said opera "Sweethearts" has acquired a valuable reputation and great popularity with the public through its intrinsic merits, and through the expenditure of large sums of money in advertising the performances of the same and for its cast, production and accessories, and the said opera became very successful and a source of great profit to your orators (excepting G.

Schirmer, Inc.) who realized large sums of money from the performances of the same by way of royalties based upon a percentage of the gross receipts of each and every performance th-reof. The said opera "Sweethearts" is of great value and exceeds in value the sum of Five thousand ($5,000.00) Dollars, and the damages suffered by your orators by reason of the wrongful acts of the defendant hereinafter mentioned exceed the sum of Five thousand ($5,000.00) Dollars, and the value of the injunction prayed for herein exceeds the sum of Five thousand ($5,000.00) Dollars.

XIV. Upon information and belief that the defendant on the 1st day of April, 1915, and at other times subsequent thereto, without the knowledge, consent, permission or approval of your orators, and against the will of your orators and in infringement of the said copyright in the said dramatico-musical composition "Sweethearts" and of the said copyright in the said vocal score of said composition, and in violation of the right of your orators in the said dramatico-musical work produced, performed and represented publicly in the defendant's restaurant and place of public entertainment on said premises known as "Shanley's," Broadway 43 and 44th Streets, New York City, the said vocal number "Sweethearts" and caused the said number to be played and performed by professional singers upon a
9 stage maintained by the defendant in the dining hall of said premises accompanied by an orchestra. That the said vocalists and orchestra were engaged by the defendant to perform and play upon said premises for compensation; that the said performances of the said vocal number on the said premises were public and were not given for a charitable, religious or educational purpose, but were given for the purpose of the defendant's business and as part of the service rendered to the patrons of the defendant's said establishment who purchased and partook of meals or refreshments at said establishment, and said performances were given as one of the special features of the said business.

XV. That the defendant advertised the business conducted on said premises in the New York Review, the New York Times and other papers published and circulated in the City of New York, in the manner following, to wit:

"Shanley's,

Broadway—43rd to 44th St.

Perfection in Food and Service.

Inimitable Entertainment.

Cabaret Extraordinaire.

Twenty Acts Every Evening 7 to 1.

Superior Seven-course Luncheon, 75c. (Music.)"

Famous
for
Dinners
and
Suppers.

XVI. On information and belief: That the said performances of said vocal number of said opera by the orchestra and the professional vocalists employed by the defendant were given by the defendant for the entertainment and amusement of the patrons patronizing said establishment, and purchasing food for refreshments of the defendant, and for the purpose of attracting patrons to said establishment, and in order to make the business of the defendant profitable.

XVII. On information and belief: That the said performances of said vocal number of said opera were part of a theatrical entertainment given by the defendant upon said premises in order to attract patrons to its said establishment and for the entertainment and amusement of its patrons gives a theatrical entertainment which consists of a series of theatrical exhibitions, the performers of which acts or exhibitions are under the pay of the defendant, and the weekly cost of the entertainment offered to the public during each week is upwards of One thousand ($1,000.00) Dollars. That the defendant did and does advertise the said theatrical entertainment as an inducement to patrons to dine and partake of refreshments in defendant's restaurant.

XVIII. That the said wrongful public performances and representations by the defendant of said vocal number "Sweethearts" have attracted and are attracting many persons to the defendant's place of business to hear the said vocal number, and the defendant threatens to continue the unlawful and wrongful performances of the said numbers.

XIX. That the acts of the defendant are causing great injury and damage to the business and profits of your orators, because they are thereby deprived of the exclusive right to publicly perform and represent the said dramatico-musical composition "Sweethearts" and to grant to others the privilege to publicly

perform and represent the said composition on the payment of royalties. That no proprietor, lessee or manager of any place of entertainment or amusement will make a contract with your orators for the privilege to publicly perform the said musical comedy in public upon the payment of a license fee or royalty, if the defendant is permitted to continue the unlawful acts hereinabove set forth, and it will further seriously injure your orators in the profits to be derived from the public performances of the said opera and will further diminish the value of said opera and that the injury cannot be accurately ascertained or computed, and that your orators, by reason of the aforesaid unlawful use of their property, are irreparably injured, all of which acts are contrary to equity and good conscience, and tend to the injury and wrong of your orators.

And your orators further show that they have no adequate and available remedy at law against the said continued violation of their rights, inasmuch as the injury is a continuous one and involves endless litigation and furthermore, is of such a nature that the extent of your orators' loss could not be measured or estimated or proved to the full measure thereof produced.

Wherefore, your orators pray:

I. That a writ of subpœna issue out of this Court, directed to the defendant, commanding the defendant on a day therein named to appear in this Court and make answer to this bill.

12 II. That the defendant, its agents and servants, and all other persons acting under the direction, control, permission or license of the defendant, be enjoined and restrained, during the pendency of this action and perpetually, from publicly performing or reproducing the dramatico-musical composition "Sweethearts" or any part thereof, and from causing or permitting the said composition, to be publicly represented and performed in the defendant's establishment known as "Shanley's" on Broadway, between 43rd and 44th Streets, in the Borough of Manhattan, City of New York, or in any place owned, controlled or conducted by the defendant in the public performance of said composition in any such place.

III. That your orators, excepting your orator G. Schirmer, Inc., have judgment against the defendant for the sum of Five thousand ($5,000.00) Dollars for damages.

IV. That your orators have such other and further relief as may be just and equitable.

NATHAN BURKAN,
Solicitor for Complainants.

VICTOR HERBERT,
ROBERT B. SMITH,
FRED DE GRESAC MAURIEL,
G. SCHIRMER, INC.,
By G. SCHIRMER, *Secretary,*
Complainants.

13 STATE OF NEW YORK,
City and County of New York, ss:

G. Schirmer, being duly sworn, deposes and says: That he is the secretary of G. Schirmer, Inc., one of the complainants in the within action; that he has read the foregoing bill of complaint and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true. That the reason why this verification is made by deponent and not by complainant is that the complainant is a corporation.

G. SCHIRMER, *Secretary.*

Sworn to before me this 13th day of April, 1915.
[SEAL.] ABRAHAM KIPP,
Notary Public, N. Y. Co. #2001.

STATE OF NEW YORK,
City and County of New York, ss:

Victor Herbert, being duly sworn, deposes and says: That he is one of the complainants in the within action; that he has read the foregoing bill of complaint, and knows the contents thereof; that the same is true to his own knowledge, except as to the matters
14 therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

VICTOR HERBERT.

Sworn to before me this 13th day of April, 1915.
[SEAL.] ABRAHAM KIPP,
Notary Public, N. Y. Co. #2001.

STATE OF NEW YORK,
City and County of New York, ss:

Robert B. Smith, being duly sworn, deposes and says: That he is one of the complainants in the within action; that he has read the foregoing bill of complaint and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

ROBERT B. SMITH.

Sworn to before me this 13th day of April, 1915.
[SEAL.] ABRAHAM KIPP,
Notary Public, N. Y. Co. #2001.

STATE OF NEW YORK,
City and County of New York, ss:

Fred de Gresac Maurel, being duly sworn, deposes and says: That she is one of the complainants in the within action; that she
15 has read the foregoing bill of complaint and knows the contents thereof; that the same is true to her own knowledge, ex-

cept as to the matters therein stated to be alleged on information and belief, and that as to those matters she believes it to be true.

FRED DE GRESAC.

Sworn to before me this 13th day of April, 1915.

[SEAL.] ABRAHAM KIPP,
Notary Public, N. Y. Co. #2001.

Filed U. S. D. C.—S. D. of N. Y., April 14, 1915.

EXHIBIT "A," ANNEXED TO BILL OF COMPLAINT.

24029.

Copyright Office of the United States of America.

Library of Congress—Washington.

Certificate of Copyright Registration.

This is to certify, in conformity with section 55 of the Act to Amend and Consolidate the Acts respecting Copyright approved March 4, 1909, that two copies of the Dramatico-Musical Composition named herein have been deposited in this Office under the provisions of the said Act, and that registration for copyright for the first
16 term of 28 years from the date of publication thereof has been duly made in the name of G. Schirmer, 3 E. 43rd St., New York, N. Y. Sweethearts. A comic opera in two acts. Book by Harry B. Smith and Fred de Gresac, Lyrics by Robert B. Smith, of United States. Music by Victor Herbert of United States. Vocal score.

Copies received Apr. 4, 1913.

Date of publication Apr. 2, 1913. Entry: Class D,XXc, No. 19276.

EXHIBIT "B," ANNEXED TO BILL OF COMPLAINT.

Copyright Office of the United States of America,

Library of Congress,

Washington, D. C.

Certificate of Copyright Registration.

This is to certify (in conformity with section 55 of the Act to Amend and Consolidate the Acts respecting Copyright approved March 4, 1909, as amended by the Act approved March 2, 1913), that one copy of the Dramatic Composition named herein has been

deposited in this office under the provisions of the Act of 1909, and that registration of a claim to copyright for the first term of twenty-eight years has been duly made in the name of Harry B. Smith, claimant of copyright, whose address is 319 W. 107th St., New York, N. Y.; the title of the dramatic composition registered is
17 Sweethearts. Book by Harry B. Smith and Fred de Gresac, Lyrics by Robert B. Smith. Music by Victor Herbert. A comic opera in 2 acts, book and lyrics, the authors are citizens of United States; one copy was received April 18, 1913, and registration has been made as Class D, XXc., No. 32987.

(SEAL.) ARTHUR CRISFIELD,
Assistant Register of Copyrights.

Order to Show Cause and Affidavits in Support of Motion for Injunction.

District Court of the United States, Southern District of New York.

VICTOR HERBERT, HARRY B. SMATH, ROBERT B. SMITH, FRED DE GRESAC MAUREL, and G. SCHIRMER, Inc., Complainants,
against
THE SHANLEY COMPANY, Defendant.

Upon the bill of complaint in this action and the affidavits of Victor Herbert, John Leffler and Samuel W. Tannenbaum, verified the 12th day of April, 1915, respectively, the subpoena and the exhibits hereto annexed,

18 Let the defendant or its attorney show cause before one of the Judges of this Court, at a Stated Term thereof, to be held at the General Post Office Building, in the Borough of Manhattan, City of New York, at Room 235, on the 16th day of April, 1915, at the opening of the court or as soon thereafter as counsel can be heard, why an order should not be made restraining the defendant from publicly performing or representing the comic opera "Sweethearts" or any part thereof, including the musical composition "Sweethearts," and from causing the said composition to be publicly represented and performed and from aiding and abetting the performance of said musical work and from permitting the said musical work to be performed, sung or played in the defendant's establishment known as Shanley's, Broadway, between 43rd and 44th Streets, Borough of Manhattan, City of New York, or in any place owned or conducted by the defendant; and for such other and further relief as to the Court may seem just.

Service of a copy of this order on or before the 14th day of April, 1915, is hereby made sufficient service of this order and notice of this application.

Dated, New York, April 14, 1915.

LEARNED HAND, *D. J.*

Filed, U. S. D. C.—S. D. of N. Y.—April 29, 1915.

19 *Affidavit of John Leffler in Support of Motion for an Injunction.*

District Court of the United States, Southern District of New York.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DE GRESAC MAUREL, and G. SCHIRMER, Inc., Complainants,
against
THE SHANLEY COMPANY, Defendant.

SOUTHERN DISTRICT OF NEW YORK,
State of New York, City and County of New York, ss:

John Leffler, being duly sworn, deposes and says that I am a theatrical manager, and have an office at No. 1402 Broadway, City and County of New York.

During the evening of April 1st, 1915, I entered the premises known as "Shanley's," between 43rd and 44th Streets, Borough of Manhattan, City of New York, occupied by the defendant herein.

That the said premises are adapted to and used for restaurant purposes and for the entertainment and refreshment of the general public.

A large platform is erected thereon and various professional actors and actresses appear on said platform and give performances for the amusement of the patrons of the defendant.

20 That said performance is known as a Cabaret Extraordinaire, and consists of twenty acts and is given between the hours of seven and one P. M. daily.

At the time I entered the said premises the said Cabaret Extraordinaire was in progress. That during the performance an orchestra appeared on the platform and played the music of the complainants' composition entitled "Sweethearts" from the comic opera "Sweethearts" and a vocalist sang the words thereof. The said orchestra played the entire music and the said vocalist sang the words from the complainants' composition "Sweethearts."

That I am familiar with the said song and have heard the same played and sung many times, and know that the music played and sung on said premises as aforesaid by the said orchestra and vocalist was the complainants' composition "Sweethearts" from the comic opera "Sweethearts."

That I entered the said premises, sat down at a table and a waiter came over to me and asked me what I wanted to order, that I ordered refreshments for which I paid.

That the said Cabaret Extraordinaire was one of the principal attractions and features of the defendant's business, and is produced by the defendant at an expense of upwards of One thousand ($1,000.00) Dollars per week.

JOHN LEFFLER.

Sworn to before me this 12th day of April, 1915.
[SEAL.] ABRAHAM KIPP,
Notary Public, N. Y. Co. No. 2001.

Filed, U. S. D. C.—S. D. of N. Y.—April 29, 1915.

21 *Affidavit of Samuel W. Tannenbaum in Support of Motion for an Injunction.*

District Court of the United States, Southern District of New York.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DE GRESAC MAUREL, and G. SCHIRMER, INC., Complainants,
against
THE SHANLEY COMPANY, Defendant.

SOUTHERN DISTRICT OF NEW YORK,
County of New York, ss:

Samuel W. Tannenbaum, being duly sworn, deposes and says: That the following is an advertisement that appeared in the New York Times, a newspaper published and circulated in the City of New York. That the following advertisement was published in the issue of said newspaper dated April 8th, 1915:

"SHANLEY'S
Famous for Dinners and Suppers
Broadway—43rd to 44th St.
Perfection in Food and Service,
Inimitable Entertainment.
CABARET EXTRAORDINAIRE
Twenty Acts Every Evening 7 to 1

SUPERIOR SEVEN-COURSE
LUNCHEON, 75c. (MUSIC)."

22 That I cut the above advertisement from a copy of said issue of said newspaper The New York Times dated and published April 8th, 1915.

That similar advertisements of the musical and dancing entertainments given at defendant's restaurant known as Shanley's have appeared in the New York Times and other daily newspapers circulated in New York City prior and subsequent to April 8th, 1915.

SAMUEL W. TANNENBAUM.

Sworn to before me this 13th day of April, 1915.
[SEAL.] ABRAHAM KIPP,
Notary Public, N. Y. Co. #2001.

Filed, U. S. D. C.—S. D. of N. Y.—April 29, 1915.

23 *Affidavit of Victor Herbert in Support of Motion for an Injunction.*

District Court of the United States, Southern District of New York.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DE GRESAC MAUREL, and G. SCHIRMER, INC., Complainants,
against
THE SHANLEY COMPANY, Defendant.

SOUTHERN DISTRICT OF NEW YORK,
State of New York, City and County of New York, ss:

Victor Herbert, being duly sworn, deposes and says: I am one of the above-named complainants. I have read the bill of complaint herein and that the same is true to my own knowledge, except as to the matters therein stated to be alleged on information and belief and as to those matters I believe it to be true, and I make the said bill of complaint part of this affidavit.

I am a composer of a number of copyrighted operas and the value of my copyrights depends largely on my exclusive right to control the public representation of the works copyrighted.

The methods resorted to by the defendant of attracting patronage to its establishment, by giving public performances of copyrighted works, have been widely adopted by other proprietors of hotels, restaurants and places of public accommodation.

24 Appended hereto are advertisements appearing in the daily press showing that regular theatrical performances are being given nightly in hotels, restaurants and places of public accommodation, although no direct pecuniary charge or fee is made, in order to attract patronage.

The legalizing of the practice complained of will cause a diminution of the attendance at licensed performances of the complainants' opera "Sweethearts" and will deprive us of the power to prevent the inferior rendition of our works and the injury to the artistic reputation of the works that would result from such inferior rendition.

If unlicensed performances of the opera "Sweethearts" are permitted in hotels, restaurants and similar resorts, the most valuable parts of the opera "Sweethearts" may be produced in these places simultaneously with the licensed performances, and the success of the licensed performances will be thus seriously hampered.

As the defendant is now giving public performances of said composition and is threatening to continue to give the same upon its premises and the value of the complainants' rights in said composition is being diminished by reason of the unlawful acts of defendant, an order is respectfully asked for returnable at the earliest possible moment directing the defendant or its attorney to show cause why an order should not be made enjoining and restraining the defendant, its agents, servants and employees from in any manner

publicly producing, performing or representing the composition set forth in the bill of complaint or any part thereof or any imitation or simulation thereof any why the complainants should not have such other and further relief as to the Court may seem just.

25 That no previous application for the order now asked for has been made to any Court or Judge.

VICTOR HERBERT.

Sworn to before me this 13th day of April, 1915.

[SEAL.] ABRAHAM KIPP,
Notary Public, N. Y. Co. #2001.

Filed U. S. D. C.—S. D. of N. Y. April 29, 1915.

Answer.

District Court of the United States, Southern District of New York.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DE GRESAC MAUREL and G. SCHIRMER, INC., Complainants,
against
THE SHANLEY COMPANY, Defendant.

For its answer to the bill of complaint herein, the defendant alleges:

I. The defendant admits that it is a domestic corporation organized and existing under and pursuant to the laws of the

26 State of New York, and that it is maintaining a restaurant and place of public accommodation in the Borough of Manhattan, City of New York, in the Southern District of New York, but denies each and every other allegation contained in the paragraph marked or numbered "III" of the bill of complaint.

II. The defendant admits the allegations contained in the paragraph marked or numbered "IV" of the bill of complaint that it maintains a restaurant and place of public accommodation and refreshment on Broadway between 43rd and 44th Street, in the Borough of Manhattan, City of New York, but it denies each and every other allegation contained in the said paragraph marked or numbered "IV" of the bill of complaint.

III. The defendant denies any knowledge or information sufficient to form a belief as to the allegations contained in the paragraph marked or numbered "VI" of the bill of complaint, except that it admits that complainants duly copyrighted said work "Sweethearts."

IV. The defendant denies any knowledge or information as to the allegations contained in the paragraph marked or numbered "XIII" of the bill of compliant, except that the defendant denies that the complainants suffered any damages by reason of the acts of the defendant as set forth in the bill of complaint as is alleged in paragraph "XIII" thereof.

V. The defendant admits that on the 1st day of April, 1915, and other times subsequent thereto, the defendant, through its
27 agents, servants and employees, caused to be sung in the defendant's restaurant known as "Shanley's" at Broadway between 43rd and 44th Street, Borough of Manhattan, New York City, a vocal selection published by G. Schirmer, Inc., and sold to the defendant's agents, servants or employees, and known as "Sweethearts." That the said song "Sweethearts" was a vocal selection published in sheet music form and published and sold separately and not as part of any dramatico-musical composition. The defendant also admits that the persons singing the said song known as "Sweethearts" received compensation therefor from the defendant, but it denies each and every other allegation contained in the paragraph marked or numbered "XIV" of the bill of complaint except as herein otherwise specifically admitted. The defendant further alleges that the said song "Sweethearts" was sung in the restaurant conducted by the defendant for the entertainment of the patrons of the said restaurant exclusively. That no admission fee or other charge was made to the patrons of said restaurant.

VI. The defendant admits that the rendition of said vocal selection known as "Sweethearts" was given by the defendant to its patrons patronizing the restaurant conducted by it, but the defendant denies each and every other allegation contained in the paragraph marked or numbered "XVI" of the bill of complaint.

VII. The defendant denies each and every allegation contained in the paragraph marked or numbered "XVII" of the bill of complaint.

VIII. The defendant denies each and every allegation contained in the paragraph marked or numbered "XVIII" of the bill of complaint.

28 IX. The defendant denies each and every allegation contained in the paragraph marked or numbered "XIX" of the bill of complaint.

For a first, separate and distinct defense to the alleged cause of action contained in the bill of complaint herein, the defendant alleges:

X. That the complainant, G. Schirmer, Inc., with the knowledge and consent of the complainants Victor Herbert, Harry B. Smith, Robert B. Smith and Fred de Gresac Maurel, published the musical composition known as "Sweethearts" and referred to in the bill of complaint as a separate vocal number, and that said vocal number "Sweethearts" was copyrighted separate and apart from any dramatico-musical composition, and that said vocal number "Sweethearts" was published and offered for sale and sold to the defendant and to the public generally by the complainant G. Schirmer, Inc., as a separate musical composition and not as part of any dramatico-musical composition.

XI. That the defendant caused a copy of said vocal composition known as "Sweethearts" to be purchased and by virtue of the purchase of the said vocal number referred to, the defendant was authorized and empowered by the complainants to perform said

musical composition or cause the same to be performed in the defendant's restaurant as herein set forth.

XII. That the said musical composition or vocal number referred to in the bill of complaint as "Sweethearts" was caused to be performed by the defendant in the restaurant conducted by it as set forth in the bill of complaint. That no charge was made by the defendant for admission to the said restaurant or for the privilege of listening to any performance of music therein, or of listening to the performance of the said vocal number "Sweethearts" therein. That no additional charge was made for meals furnished in said restaurant at the time when such music or such vocal composition was performed over the charge made when there was no music and no vocal compositions performed.

XIII. That the rendition of such vocal number was incidental to the restaurant business as conducted by the defendant as herein set forth. That the said musical composition or vocal number entitled "Sweethearts" mentioned and described in the bill of complaint herein was not performed by the defendant or caused to be performed by the defendant publicly for profit.

XIV. That the said vocal number or musical composition known as "Sweethearts" and referred to in the bill of complaint as published by the complainant, G. Schirmer, Inc., and as sold to the defendant and to the public generally and as performed in the defendant's restaurant, was not a portion of any dramatico-musical composition.

For a second, separate and distinct defense to the alleged cause of action contained in the bill of complaint herein, the defendant alleges:

XV. That the bill of complaint herein does not state facts sufficient to constitute a cause of action under the Copyright Law approved March 4th, 1909, as amended.

Wherefore the defendant prays that the bill of complaint herein may be dismissed with costs, and for such other and further relief as to the Court may seem just and proper.

THE SHANGLEY COMPANY,
By GILBERT, LAUTERSTEIN AND GILBERT,
Solicitors, No. 43 Exchange Place, Borough of Manhattan, New York City.

STATE OF NEW YORK,
City and County of New York, ss:

John J. Moran, being duly sworn, deposes and says: That he is the Secretary of The Shanley Company, a domestic corporation, the defendant in this action; that he has read the foregoing answer and knows the contents thereof; that the same is true to his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

JOHN J. MORAN.

Sworn to before me this 22nd day of April, 1915.
A. MURRY ROSENTHAL,
Notary Public, New York Co., No. 211.

Filed U. S. D. C.—S. D. of N. Y.—April 29, 1915.

31 *Affidavit in Opposition to Motion for an Injunction.*

District Court of the United States, Southern District of New York.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DE GRESAC MAUREL and G. SCHIRMER, Inc., Complainants,
against
THE SHANLEY COMPANY, Defendant.

SOUTHERN DISTRICT OF NEW YORK,
State of New York, City and County of New York, ss:

John J. Moran, being duly sworn, deposes and says: I am an officer of the defendant, The Shanley Company, to wit, the Secretary thereof, and I am general manager of the business conducted by the defendant.

The defendant conducts a hotel and restaurant known as "Shanley's" on Broadway between 43rd and 44th Streets, in the Borough of Manhattan, City of New York. The restaurant is on the ground floor and is used as any high class restaurant in the city is used, to wit, for the purpose of serving food and drink to patrons who pay the price therefor. No charge is made for admission to said restaurant or for the privilege of listening to any performance of music therein, and the only remuneration received by the defendant
32 from any of the patrons who enter said restaurant is from the sale of food and drink that is ordered by the said patrons. There is no rule requiring the patrons to order or pay for a minimum amount of food or drink. A person who only desires a sandwich has as much right to enter said restaurant and receives as much attention from the management thereof as a person who desires to order an elaborate meal.

In the said restaurant is erected a platform on which platform an orchestra is seated at certain hours of the day during which a musical program is given for the benefit of the patrons of the restaurant. This platform is not a stage. It has none of the appurtenances that are necessary parts of a stage, that is to say, it has no foot lights, side lights, border lights, scenery, wings, curtain or flies. No theatrical performance is given in the premises. None of the singers who appear ever appear in any costume other than the ordinary conventional evening dress costume. None of the songs that are sung are ever sung in character. Shanley's restaurant serves about twenty-five hundred (2500) people each day. The musical entertainment is, however, only given during limited hours. At the lunch period, to wit, from about noontime to 2 P. M. the orchestra plays. From

six o'clock until closing time at about 1:30 A. M. the orchestra plays, and at intervals during that time singers appear who sing various selections of a diversified character. Some of the songs are popular melodies, some are selections from the operas, and some are musical compositions of a little bit higher musical quality than the popular songs and yet not part of a musical composition as important as an opera.

33 The musical entertainment that is given in "Shanley's" is what is popularly known as a cabaret. The word "cabaret" has a significance purely local in character and is to be distinguished entirely from what is known as a "cabaret" in Paris. In Paris the word "cabaret" was intended to mean a volunteer performance given by patrons of a restaurant or cafe, while in New York the word "cabaret" has been extended to include every form of musical entertainment that may be given in a restaurant. The form of musical entertainment now given in Shanley's restaurant is the same kind of entertainment that has been given in restaurants for many years past. The character of the entertainment now given is somewhat more elaborate than was given in restaurants fifteen or twenty years ago, but in substance it is the same. The music, however, was never the principal business of a restaurant keeper. It has always been and now is purely incidental to the restaurant business, and the price charged for food and service is the same without as with the music.

I have read the affidavits of John Leffler, Samuel W. Tannenbaum and Victor Herbert, on which the application for an injunction pendente lite is made, and I have also read the bill of complaint. It is true that, as stated in the bill of complaint and in the affidavits, the song "Sweethearts" published by G. Schirmer, Inc., and referred to in the bill of complaint and the moving affidavits was sung in Shanley's restaurant on April 1st, and on other occasions. This song was sung on those occasions by a young lady who was not an actress; who had never been employed in a theatrical production; who never appeared on the stage; and who is not what is known as an actress. At the time she sang this song she did not sing it as a part of the

34 dramatico-musical composition known as "Sweethearts." The song "Sweethearts" as sung by her is published as a separate musical composition by G. Schirmer, Inc., in the form ordinarily known as sheet music form, and the song as so published is a complete musical composition in itself. I annex hereto a copy of the lyric from which the Court can see that the song "Sweethearts" as published in sheet music form is not in itself a dramatico-musical composition but conveys a love theme entirely apart from any dramatic story. The said song "Sweethearts" was sung in the defendant's restaurants for the purpose of the entertainment of the guests then dining in said restaurant. No admission was charged to any of such guests to hear the said song or any other music in said dining room.

I deny the allegation contained in the affidavit of John Leffler that the restaurant premises conducted by the defendant are adopted for and used for the entertainment of the general public other than in the limited way that a restaurant is said to be for the entertainment of the people who desire to dine there.

The advertisement attached to the affidavits stating that a cabaret consisting of twenty acts is given, does not indicate, nor was it intended to indicate, that a theatrical performance is given in the restaurant. Each singer is known as an act and instead of stating that twenty singers are employed in the restaurant, it is stated that twenty acts are given there. The word "act" as used in the advertisement is entirely different from the word "act" as used in the theatrical profession.

I deny the statement contained in the affidavit of John
35 Leffler that the cabaret was one of the principal attractions and features of the defendant's business. As I have already stated, the principal attraction of the defendant's business is the serving of food in an attractive manner and at popular prices.

The defendant corporation has been in existence over ten years and during all of that time has been engaged exclusively in the restaurant business. Prior to that time, however, the Messrs. Shanley who are the principal stockholders in the defendant corporation were engaged in the restaurant business for at least fifteen years. In fact, the name "Shanley" in the City of New York has been so well known in connection with the restaurant business that when the name "Shanley" is mentioned it is understood to mean one of the Shanley restaurants.

I deny the statements contained in the affidavit of Victor Herbert and in the bill of complaint that the singing of the song "Sweethearts," complained of herein, in the defendant's restaurant in any way injures the artistic reputation of the said musical composition or deprives the composer or publisher of such musical composition of any profit, or that the complainants' rights in said musical composition *is* being diminished by reason of the singing of said song in the defendant's restaurant, or that the complainants are in any way damaged by reason thereof.

As a matter of fact, for the last twenty years in which I have been engaged in the restaurant business, and particularly in the last few years, the practice has been almost universal for composers and music publishers to pay the leaders of orchestras and singers in res-
36 taurants to sing and perform their compositions, because in that manner their compositions were heard by many thousands of people each week thus adding to their reputation and to the popularity of the musical composition in a manner that could not be accomplished in any other way, and ultimately increasing the sale of such musical composition. It is a matter of common knowledge that up to within six months prior to the beginning of this action, the people who are engaged by the defendant to sing were paid by music publishers and composers to sing their songs. In fact, the young lady who sang the song "Sweethearts" on the night mentioned in the bill of complaint and moving affidavits has to my knowledge frequently received as much as $50 from a musical publisher for singing one of the songs published by him, and most of the other people who are engaged in singing in restaurants up to within the last few months always understood that as part of their perquisites in addition to the salary paid to them by the proprietor of the res-

taurant they were entitled to and did receive money from composers and music publishers for singing musical compositions, thus giving these musical compositions advertising that could not be obtained in any other way. At no time has the rendition of any musical composition in any restaurant ever interfered with the giving of a dramatico-musical composition in a theatre of which the said song might have been a part.

The song "Sweethearts," as I have already stated, is published in sheet music form separate and apart from the dramatico-musical composition known as "Sweethearts." The young lady who sang the song "Sweethearts" had purchased a copy thereof which
37 was on sale to the general public in the music stores in the City of New York, and similar copies of said song "Sweethearts" are now on sale in the music stores of the City of New York and can be purchased by any one.

I am informed and verily believe that the said song "Sweethearts" referred to in the bill of complaint was copyrighted as a separate musical composition apart and distinct from the dramatico-musical composition known as "Sweethearts."

JOHN J. MORAN.

Sworn to before me this 22nd day of April, 1915.

A. MURRY ROSENTHAL,
Notary Public, New York Co., No. 211.

Exhibit Annexed to Affidavit of John J. Moran.

Sweethearts.

If you ask where love is found,
The sort of love that's fond and true,
I will bid you look around;
It may be very near to you.
Sometimes love is very trying,
But you really must not mind it;
If it comes not to your sighing,
There is always one place you may find it;

38 Seek the dwelling of two happy sweethearts,
You will find it there!
Sweethearts make love their very own,
Sweethearts can live on love alone,
For them the eyes where love-light lies
Open the gates to Paradise!
All other love is doomed to fade,
It is like sunshine veiled in shade.
Such joys of life as love imparts
Are all of them yours, sweethearts!

Love that's real will come to stay,
And ev'ry kiss will feed the flame;
Love that lingers for a day
Is most unworthy of the name.
When it softly comes a-stealing
To your heart, then you will know it.
You may fight against revealing,
But a word, a sigh, a glance, will show it.
Still if you but love like other sweethearts,
You have naught to fear.

Sweethearts make love their very own,
Sweethearts can live on love alone,
For them the eyes where love-light lies
Open the gates to Paradise!
All other love is doomed to fade,
It is like sunshine veiled in shade.
Such joys of life as love imparts
Are all of them yours, sweethearts!

Filed U. S. D. C., S. D. of N. Y., April 29, 1915.

39 *Newspaper Clippings Annexed to Affidavit of Victor Herbert.*

The Morning Telegraph, Feb. 21, 1915.

MAXIM'S

110 West 38th Street
"Always in the Lead"
Takes Pride in Announcing
Commencing

TO-MORROW NIGHT

February 22d, 1915,
at Midnight and Every Night Following,

LEA HERRICK AND PERCY ELKELES

Present the Musical Frivolity,

"KEEP MOVING."

In two Moves. Staged by Julian Alfred.
With a cast of
Broadway Principals and "Some Girls,"
Public Dancing as usual.
No charge for admission.

N. Y. Evening Telegram, April 10, 1915.

Mr. John J. Healy,
Announces the first appearance of
His Midnight Revue,

Broadway & 145 St.

"STOP! LOOK! LISTEN!"

A Musical Scamper in Two Acts.

40 With a Large Company of Clever Principals and
a Chorus of Exceptionally Pretty Girls

ON THURSDAY, APRIL 15, 1915

at 11:30 P. M., and every night thereafter in the

MAIN DINING ROOM.

M
CAFE MAXIM

110 West 38th Street.
"Always in the Lead"
42,320 Persons Have Witnessed
This Marvelous Performance
As Many Turned Away

'KEEP MOVING'

By Lea Herrick and Percy Elkeles with Frank
Crummit and a Company of Broadway
Beauties, including a Chorus of
Wondrous Beauties.

Here the opportunity is given to a man "who missed his show" to enjoy a genuine entertainment in the style of a midnight revue.

You need not hurry through your dinner. Take your own leisure, but call before midnight.

Afternoon dances daily under the personal direction of Mr. George Pierce, from 4 to 6.30.

Every Night at Midnight.
Sunday at 11.30 P. M.
Saturday Matinee, 1.30 P. M.

Luncheon, 60c.
Dinner, $1.25.
Supper a la Carte.

41 SANS SOUCI

B'way at 42 St., Tel. Bry. 3998.

Personal Direction of Mr. Gaillard T. Boag.

New Revue with sixteen beautiful girls
Dancing 3 P. M. Till Close. Cabaret Dinner $1.

N. Y. Evening Telegram, Nov. 26, 1914.

Thursdays College Night

DUTCH ROOM

Hotel Martinique.

PICTURE OF CHORUS GIRLS IN A ROW.

To-night, During Dinner and Supper An Entirely Unique and Ever-changing

VAUDEVILLE ENTERTAINMENT

By Well Known Artists
Dancing.
Broadway at 32 Street.

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42 HOTEL MARTINIQUE DUTCH ROOM.

Broadway at 32nd & 33rd Sts. New York.

A unique and ever changing

Vaudeville Entertainment

on the stage in the

Dutch Room

During Dinner and Supper.
"Something Different."

[Picture.]
Group of "Dutch Room" Girls.

43 New York Times, April 10, 1915.

REISENWEBER'S

Columbus Circle and 58th Street
Phone 9640 Columbus
Two Performances Nightly 7:30 and 11:30
Sundays 7:30 and 10:30
No Admission Fee Charged
Edna Whistler. Marie Lavarre. Sam Ash.

TOO MUCH MUSTARD

An Exceptional Table D'Hote Dinner $1.00
Served in Main Dining Room
Dance between courses. A la Carte Portions.

The Right Quintette, wonderful singing and playing Minstrels
In Main Dining Room Every Evening Five to Ten
and Sunday Noon to Ten.
Bill of Fare itemized.

New York Evening Telegram, March 10, 1915.

BUSTANOBY'S

B'way at 60 St.
39th St. near Broadway
Commencing
Monday, March 22, at 10 P. M. and every night
thereafter
Lea Herrick and Percy Elkeles
--Present—
The Midnight Musical Dream

44 "KEEP SMILING"

in two smiles; Staged by Julian Alfred. Cast includes the famous English Comedian, Fred Walton, Maud Gray of "Fads and Fancies," "Hazel Kirke," "Sweethearts," etc., and Sylvia Jason, of "Debutantes" together with our regular entertainment.
Dinner $1.50 served until 10 P. M.
Dancing. Cabaret.

"Paris in New York."

CAFÈ DES BEAUX-ARTS.

40th St. & 6th Avenue

"Really Different"

N. Y. Times, February 21, 1915.

RECTORS

Broadway and 48th Street.

Tonight and Every Night Except Saturday. The Best Table D'Hote Dinner Dansant in New York at $1.25 per Cover.
45 Most generous portions and great variety.

Served in the finest and best ventilated Ball Room in the world. After dining one can dance and watch exhibition dancing unequalled on any stage.

Best Cabaret in New York.

Vera Maxwell and John Jarrott and the Marvellous Millers.

Unequalled—Unsurpassed.

Best Cuisine and Service at Reasonable Prices.

Phone Bryant 3200 for reservations.

January New York Times.

BILLIE'S CAFE AND RATHSKELLER

727 Seventh Avenue

Entertainment Afternoon and Evening.
Vocal and Instrumental.

W. J. Gallagher, Proprietor. Bennie Doyle, Manager.

WALLICK'S RESTAURANT
Broadway and Forty-third Street.

After Extensive Alterations

WILL OPEN WITH A NEW SENSATION

Thursday Evening, Oct. 29th at Six O'Clock

Quality, Increased Portions and Decreased Prices.

Big Show Including Several European Entertainers.

Dancing in the Poppy Room. Best Music in New York.

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46 THE BILTMORE

Announces

THÈS DANSANTS

Every Tuesday, Thursday and Saturday afternoon from four until six o'clock in the ball room and

Dinner Dances every Tuesday evening at eight o'clock in the ballroom.
Supper Dances every evening in Main Dining Room after 10:30 o'clock.

Mrs. A. M. Thackara, Jr., and Holland B. Judkins under the direction of Mrs.

A. M. Thackara, Jr.

Beginning

Monday Nov. 10 and continuing every Monday, Wednesday and Friday afternoon

Maurice and Miss Florence Walton

will give exhibition dances in the ballroom from four until six o'clock under the direction of Mrs. A. M. Thackara, Jr.

47 N. Y. Times, Feb. 25, 1915.

Now Nightly at Supper.
(Picture of man and woman dancing.)

DUQUE and GABY

CAFE des BEAX ARTS.
80 West 40th Street.
Thursday, Feb. 25
Tango Night.

The Revue, Feb'y 6, 1915.

HOTEL BRESLIN
Broadway and 29th Street, New York.

Newly Opened.
Green Room: Tea and Dinner Dancing Four to Nine P. M.
Under Direction of Mr. & Mrs. Rowley Downes, Late of Rector's and Casino Narragansett Pier.
Service a la Carte.
It's Jes' Down Yonder.
Dixie Room. Exceptional Dinner De Luxe, $1.25.
6.00 P. M. to 8.30 P. M.
Music and Vocal Entertainment During Dinner. Southern Specialties.

Music by Mr. Arthur M. Kraus, composer of Meadowbrook Fox Trot.

48 PERSIAN GARDEN

Nightly at 10:30—Thé Dansants Sats.

Exhibition Dancing by
Ida Adams and Nigel Barrie.

Next Monday—"The Only Girl" Night.

"CHEZ" MAURICE
Formerly Palais De Danse

Nightly 10:30 to Closing, inc. Sunday

50th St. & B'way
Phone 9260 Col.

MAURICE AND FLORENCE WALTON

Mon. & Thurs.—Louis XVI. Nights—Valse by Caruso.
Tuesday & Friday "Apache Nights."
Fine Band Exquisite Cuisine

A Bracing Ride—A Jolly Dinner—A Round of Golf—A Merry Dance

HUNTER ISLAND INN

15 Miles from 59th St. on the Pelham Shore Road

PELHAM BAY PARK
(Overlooking the Sound)

Cuisine, Service and Surroundings—All that the Most Exacting Could Desire. Cup Contest Every Tuesday.

A. E. MACLEAN.

49 CASTLES IN THE AIR

Atop the 44th Street Theatre
Telephone, 5935 Bryant.
Nightly at 11 P. M. Admission $1.

MR. & MRS. VERNON CASTLE

Daily Teas at 5, no admission.

On Saturdays (Mr. & Mrs. Castle Dancing)
Admission $1, Including Tea.

Town Topics.

Announcement
HOTEL KNICKERBOCKER GRILLE ROOM

Now Open
Dancing Supper
From 11 P. M. to 2 A. M.

Special Vocal and Instrumental Concerts
Main Restaurant, Sunday Evenings.
Beginning Sunday Oct. 11, 1914.

James B. Regan.

50 HOTEL IMPERIAL

Broadway, Thirty-first to Thirty-second Street

Dancing

Daily (Sunday excepted) in the Palm Garden Tango Tea
4 to 6.30 P. M.
Supper Dance 10 P. M. to 1 A. M.
With service a la carte or selected menu, $1.00.
Exhibitions of all the new society dances.

Irresistible dance music, excelling any other in New York, by the celebrated Imperial Orchestra, increased by drums and Hungarian cymbals.

Hotel Imperial.

N. Y. Times, February 28, 1915.

To-day at the tea hour at

CHIRO'S

Mr. Jay Clancy will begin a series of Saturday afternoon exhibitions of the newest of the new dances. His own version of the Lulu Fado will be shown to-day.

An exceptionally delicious luncheon is served daily from one until two-thirty. High tea is from four until half after six. There is dancing at both times.

For tables telephone Murray Hill 6488

Six East Forty-six Street.

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51 The Evening Sun, April 10, 1915.

Sunday dinner at

HOTEL MARTINIQUE

Broadway at 32d & 33d Sts.,

The House of Taylor.

Served in Louis XV Dining Room and also in Dutch Room from 6 to 9 P. M.

Vocal and Instrumental Music in Louis XV Dining Room.

Menu.

High Class Vaudeville Entertainments of Twenty-two Numbers in the Dutch Room.

Tables can be reserved in advance. Phone Madison Sq. 8000

Filed U. S. D. C.—S. D. of N. Y., April 29, 1915.

52 *Stipulation as to Certain Facts.*

District Court of the United States, Southern District of New York.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DE GRESAC MAUREL, and G. SCHIRMER, INC., Complainants,
against
THE SHANLEY COMPANY, Defendant.

For the purpose of this action it is hereby stipulated as follows:

That an arrangement for the high voice of the vocal number entitled "Sweethearts" from the Comic Opera "Sweethearts," referred to in the bill of complaint, was separately copyrighted as a musical composition, and that copies of said vocal number in the form annexed were sold by S. Schirmer, Inc., to all persons desiring to purchase the same. That a copy of said vocal number is hereto annexed, marked Exhibit C.

That a selection containing all the numbers from the Comic Opera "Sweethearts" arranged for the piano, including the waltz song "Sweethearts," referred to in the bill of complaint, was separately copyrighted as a musical composition and that copies of said selection were sold by G. Schirmer, Inc., to all persons desiring to purchase the same. That a copy of said selection is hereto annexed, marked Exhibit D.

53 That the said selection, containing all of the numbers from the Comic Opera "Sweethearts," including the waltz song "Sweethearts" referred to in the bill of complaint, was orchestrated and arranged for performance by bands and orchestras and that copies of said orchestrations were sold by G. Schirmer, Inc., to all persons desiring to purchase the same, including conductors and leaders of bands and orchestras. That one set of said orchestrations is hereto annexed, marked Exhibit E.

Dated, April 28th, 1915.

NATHAN BURKAN,
Solicitor for Complainants.
GILBERT, LAUTERSTEIN & GILBERT,
Solicitors for Defendant.

Filed, U. S. D. C.—S. D. of N. Y., April 29, 1915.

EXHIBIT C.

Sheet Music Song "Sweethearts."

(Here follows sheet music marked page 54.)

CHARTS

TOO

LARGE

FOR

FILMING

55 EXHIBIT D.

Selection containing all the numbers from the Comic Opera "Sweethearts, arranged for the piano, including the waltz song "Sweethearts" to be submitted to the Honorable Judges of the U. S. Circuit Court of Appeals, upon the argument of the appeal.

EXHIBIT E.

Set of Orchestrations of the numbers of Comic Opera "Sweethearts" arranged for performance by bands and orchestras to be submitted to the Honorable Judges of the U. S. Circuit Court of Appeals, upon the argument of the appeal.

Stipulation as to Entry of Final Decree.

District Court of the United States, Southern District of New York.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DE GRESAC MAUREL, and G. SCHIRMER, INC., Complainants,
against
THE SHANLEY COMPANY, Defendant.

It is hereby stipulated that this cause is submitted to Hon. Learned Hand, District Judge for final decision upon the bill of com-
56 plaint, answer, the stipulation dated the 28th day of April, 1915, and the affidavits submitted on the motion for a temporary injunction, and that a final decree may be entered upon the decision herein.

Dated, April 28, 1915.

NATHAN BURKAN,
Solicitor for Complainants.
GILBERT, LAUTERSTEIN & GILBERT,
Solicitors for Defendant.

Filed U. S. D. C.—S. D. of N. Y., April 29, 1915.

Opinion of Hand, J.

United States District Court, Southern District of New York.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DE GRESAC MAUREL, and G. SCHIRMER, INC.,
against
THE SHANLEY COMPANY.

The plaintiffs are together the authors of a comic opera, "Sweethearts," of which Herbert composed the music and the other three

individual plaintiffs wrote the words. This has been performed in New York and elsewhere, and the words and music together
57 have been printed by the corporate plaintiff G. Schirmer, Inc., which took out a copyright upon the whole opera and upon various pieces musical compositions. The plaintiff Harry B. Smith also took out a copyright upon the libretto of the opera, in so doing complying with all formalities necessary to procuring a copyright as a dramatic composition.

The defendant owns and keeps in the City of New York a restaurant with a large dining room on the ground floor, in the centre of which it has erected a stage without proscenium, wings or backdrop. Upon this stage during the evenings and while the guests are eating actors and singers appear who sing songs to the accompaniment of an orchestra, and who at times accompany the songs with dancing. This is called a "cabaret." The defendant charges no admission to the dining-room, and gets its profit from the food and drink sold to the guests while they listen to the performance.

In the opera, "Sweethearts," appears a solo with chorus, entitled "Sweethearts," with orchestral accompaniment, the words and music being separately published by G. Schirmer, Inc., and copyrighted as a musical composition. The defendant employed a singer who had purchased a copy of this song from G. Schirmer, Inc., to sing it to the accompaniment of a small orchestra. The performance was without chorus, not in costume and without any further effort to reproduce the opera than is involved in singing the words and music.

The plaintiffs move for an injunction on the theory that the performance infringed the copyright of the dramatico-musical composition.

NATHAN BURKAN,
For the Plaintiffs.
FRANCIS GILBERT,
For the Defendant.

58 LEARNED HAND, *D. J.:*

That the opera was a dramatico-musical composition seems to me to admit of no question; a performance need not, therefore, be "for profit" to infringe under the rule in Church Co. vs. Hilliard, decided by the Circuit Court of Appeals for the Second Circuit February 9, 1915. Furthermore, a performance in words and music alone infringed the dramatico-musical copyright, for words and music alone may constitute a dramatic performance. Russell vs. Smith, 12 Q. B. 217, and it did not matter that the performance was only of a scene or part of a scene. Brady vs. Daley, 83 Fed. R., 1007. So far the case is all with the plaintiffs.

However, the authors took out a copyright upon the song separately as a musical composition, and in so doing they necessarily gave into the public domain all musical rights except as they were covered by the resulting copyright. Whatever be the minimum of musical rights, it includes the right to perform the music publicly without any unnecessary accessories. Singing the words to the music, accompanied by the orchestra, is therefore within the musical

rights so dedicated. On the other hand we now have it on the authority of Church Co. vs. Hilliard, supra, that a public performance of this kind is not within the statutory copyright which the plaintiffs received as consideration for their dedication. It seems necessarily to follow that the performance did not infringe.

This result no doubt involves the abandonment of some rights, secured by the dramatico-musical copyright, but that is because the plaintiffs wished a double protection. There can be no justice in preserving their dramatic rights at the expense of the public's
59 rights arising from taking out a musical copyright. Had they wished to retain a complete dramatic monopoly, they had it in their power to do so. As it is, that monopoly remains to their complete protection except so far as its limitation is necessary to give full scope to the musical copyright. For instance, if the performance here had been anything beyond the least essentials to a musical reproduction of the copyrighted song, it would be protected, but it was not. The plaintiffs are really trying to eat their cake and have it; they would get the full benefit of a musical copyright, while they prevent the public from enjoying the corresponding rights.

The motion is denied.

May 1, 1915.

—— ——, *D. J.*

60 *Decree.*

At a Stated Term of the District Court of the United States for the Southern District of New York, held at the United States Post Office Building, in the Borough of Manhattan, City of New York, on the 5th day of May, 1915.

Present—Hon. Learned Hand, District Judge.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DE GRESAC MAUREL, and G. SCHIRMER, INC., Complainants,
against
THE SHANLEY COMPANY, Defendant.

This cause having duly come on to be heard before Hon. Learned Hand, a Judge of this Court, upon the bill of complaint, answer, the affidavits of John Leffler, Samuel W. Tannenbaum, Victor Herbert and John J. Moran submitted on the motion for a temporary injunction and the stipulations made herein dated the 28th day of April, 1915, and the exhibits annexed to the bill of complaint, to the affidavits of Victor Herbert and John J. Moran, and to said stipulations, and Nathan Burkan, of counsel for the complainants, having been heard on the part of the complainants and Francis Gilbert, of counsel for the defendant, having been heard on the part of the defendant, and due deliberation having been had, it is

61 Ordered, adjudged and decreed that the bill of complaint herein be and the same is hereby dismissed.

LEARNED HAND,
District Judge.

We hereby consent to the form of the foregoing decree.

Dated, New York, May 1st, 1915.

NATHAN BURKAN,
Solicitor for Complainants.
GILBERT, LAUTERSTEIN & GILBERT,
Solicitors for Defendant.

Filed U. S. D. C.—S. D. of N. Y., May 5, 1915.

Petition and Order Allowing Appeal.

District Court of the United States, for the Southern District of New York.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DE GRESAC MAUREL, and G. SCHIRMER, INC., Complainants,
against
THE SHANLEY COMPANY, Defendant.

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

62 Victor Herbert, Harry B. Smith, Robert B. Smith, Fred de Gresac Maurel, and G. Schirmer, Inc., the complainants above-named, conceiving themselves aggrieved by the decree of this Court made and entered in the above-entitled action and filed in the office of the Clerk of this Court, on the 5th day of May, 1915, hereby appeal from said decree to the United States Circuit Court of Appeals for the Second Circuit and state that their reasons for said appeal are specified in the assignment of errors filed herewith, and therefore pray that this appeal may be allowed and a citation granted, directed to the above-named defendant, The Shanley Company, commanding it to appear before said Circuit Court of Appeals and to do and receive what may appertain to justice to be done in the premises, and that a transcript of the record and of the proceedings and the papers upon which said decree was made, after due authentication, may be sent to the United States Circuit Court of Appeals for the Second Circuit.

Dated, New York, May 12, 1915.

NATHAN BURKAN,
Solicitor for Complainants-Appellants,
165 *Broadway, Borough of Manhattan, New York City.*

It is ordered that said appeal be allowed as prayed for this 13th day of May, 1915.

J. M. MAYER,
United States District Judge.

Filed U. S. D. C., S. D. of N. Y., May 14, 1915.

63 *Assignment of Errors.*

District Court of the United States for the Southern District of New York.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DE GRESAC MAUREL, and G. SCHIRMER, INC., Complainants,
against
THE SHANLEY COMPANY, Defendant.

The above named complainants, Victor Herbert, Harry B. Smith, Robert B. Smith, Fred de Gresac Maurel and G. Schirmer, Inc., having appealed to the United States Circuit Court of Appeals for the Second Circuit from the final decree of this Court dismissing the bill of complaint, made and entered in the above-entitled cause and filed in the office of the Clerk of this Court, on the 5th day of May, 1915, respectfully allege and make the following assignment of errors herein:

1. The Court erred in holding that the defendant did not infringe the copyright of the complainants in the musical drama or opera entitled "Sweethearts" and the rights secured by said copyright as defined by Section 1, subdivision *d* of the Copyright Act of 1909, by causing, without complainants' consent, an important and material part of said musical drama, to wit: the vocal number "Sweethearts,"
64 to be performed by a singer and by an orchestra of musicians employed by the defendant on a stage in defendant's dining room in the manner shown by the bill of complaint, answer and proofs herein.

2. The Court erred in holding that the complainants by separately copyrighting as a musical composition the said vocal number entitled "Sweethearts," an important and material part of said copyrighted musical drama "Sweethearts," dedicated to the public all musical rights in said vocal number except such as were covered by the separate copyright acquired in said vocal number.

3. The Court erred in holding that the complainants by separately copyrighting as a musical composition the said vocal number entitled "Sweethearts," an important and material part of said copyrighted musical drama "Sweethearts," dedicated to the public their dramatic performing rights under Section 1, subdivision *d*, in that part of said musical drama consisting of the words and music of said vocal number entitled "Sweethearts."

4. The Court erred in holding that the performance of said vocal number "Sweethearts," a material and important part of said mu-

sical drama "Sweethearts," by the defendant, without the complainants' consent, in a place of public accommodation and entertainment, to wit, in defendant's dining room, on a stage erected therein, such performance being given as part of an entertainment for the amusement of the patrons of the defendant's restaurant purchasing and partaking of food or refreshments therein, and which entertainment was publicly advertised as one of the features of the service offered by the defendant to its patrons, was not a public performance
65 of said vocal number for profit within the meaning of Section 1, subdivision *e*, of the Copyright Act and was not a violation of complainants' exclusive right under the Copyright Act to perform said musical composition publicly for profit.

5. The Court erred in dismissing the bill of complaint.

Wherefore, the complainants pray that the said decree of dismissal be reversed.

NATHAN BURKAN,
Solicitor for Complainants-Appellants,
165 *Broadway, Borough of Manhattan,*
New York City.

Filed U. S. D. C., S. D. of N. Y., May 14, 1915.

Citation.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to The Shanley Company, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Second Circuit, to be held in the Post Office Building, in the Borough
66 of Manhattan, City of New York, on the 11th day of June, 1915, pursuant to an appeal filed in the office of the clerk of the United States District Court for the Southern District of New York, wherein Victor Herbert, Harry B. Smith, Robert B. Smith, Fred de Gresac Maurel and G. Schirmer, Inc., are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the decree in said appeal mentioned should not be reversed and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Julius M. Mayer, Judge of the District Court of the United States, District of New York, this 13th day of May, 1915.

J. M. MAYER,
District Judge.

Filed U. S. D. C., S. D. of N. Y., May 15, 1915.

Admission of Service of Citation.

Copy received.

GILBERT, LAUTERSTEIN AND GILBERT.

May 14, 1915.

67 *Stipulation as to Record and Exhibits.*

United States District Court, Southern District of New York.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DE GRESAC MAUREL, and G. SCHIRMER, INC., Complainants,
against
THE SHANLEY COMPANY, Defendant.

It is Hereby Stipulated by the solicitors for the respective parties hereto that the record for the appeal in the above-entitled action from the judgment of the District Court of the United States for the Southern District of New York, entered in the office of the Clerk of said court on the 5th day of May, 1915, shall consist of the following papers: Subpœna and proof of service thereof; bill of complaint and exhibits annexed thereto; order to show cause for an injunction and affidavits of John Leffler, Samuel W. Tannenbaum and Victor Herbert annexed thereto, and the newspaper clippings annexed to the affidavit of Victor Herbert; the answer of the defendant; the affidavit of John J. Moran; the stipulation entered into by the solicitors for the respective parties admitting certain facts herein, dated April 28th, 1915, and the exhibits annexed to said stipulation; the stipulation entered into between the solicitors for the respective parties hereto stipulating that a final decree be
68 entered upon the decision of the motion for a temporary injunction and dated April 28th, 1915; the opinion rendered herein by Hon. Learned Hand, District Judge; the decree entered herein on the 5th day of May, 1915; the petition of appeal and the order allowing the same; the assignment of errors; the citation and admission of service thereof; this stipulation; and the certificate of the Clerk of this court as to the correctness of the transcript of the record.

It is Further Stipulated that the printing of the bond on said appeal is hereby waived.

It Is Further Stipulated that the printing of Exhibits D and E annexed to the stipulation dated April 28th, 1915, is hereby waived, and that the said exhibits be submitted to the Honorable Judges of the U. S. Circuit Court of Appeals upon the argument of this appeal; and It Is Further Stipulated that the original advertisements referred to in the affidavit of Victor Herbert annexed to the notice of motion for an injunction be submitted to the Honorable Judges of the Circuit Court of Appeals upon the argument of this appeal.

Dated, New York, June 2nd, 1915.

NATHAN BURKAN,
Solicitor for Complainants-Appellants.
GILBERT, LAUTERSTEIN & GILBERT,
Solicitors for Defendant-Respondent.

Filed U. S. D. C., S. D. of N. Y., June 4th, 1915.

69 *Stipulation of Record.*

United States District Court, Southern District of New York.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DE GRESAC MAUREL, and G. SCHIRMER, INC., Complainants,
against
THE SHANLEY COMPANY, Defendant.

It Is Hereby Stipulated And Agreed that the foregoing record is a true and correct transcript of the record and proceedings had herein and may be certified by the Clerk of the Court and filed in the office of the Clerk of the Circuit Court of Appeals.

Dated, New York, July 6, 1915.

NATHAN BURKAN,
Solicitor for Complainants-Appellants.
GILBERT, LAUTERSTEIN & GILBERT,
Solicitors for Defendant-Respondent.

70 *Order as to Record on Appeal.*

United States District Court, Southern District of New York.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DE GRESAC MAUREL, and G. SCHIRMER, INC., Complainants,
against
THE SHANLEY COMPANY, Defendant.

Upon reading the stipulation dated June 2nd, 1915, and filed June 4th, 1915, between the parties hereto as to the contents of the record on appeal in this case, and upon examination of the printed transcript of the record agreed upon by the parties and submitted to the Clerk for certification pursuant to the said stipulation, the said record is hereby approved and the Clerk is ordered to certify the same accordingly.

Dated, New York, July 8, 1915.

LEARNED HAND,
U. S. D. J.

71 *Clerk's Certificate.*

United States of America, Southern District of New York.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DE GRESAC MAUREL, and G. SCHIRMER, INC., Complainants,
against
THE SHANLEY COMPANY, Defendant.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do

hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto Affixed, at the City of New York, in the Southern District of New York, this 9th day of July, in the year of our Lord one thousand nine hundred and fifteen, and of the Independence of the said United States, the one hundred and fortieth.

[SEAL.] ALEXANDER GILCHRIST, JR., *Clerk.*

18067.

72 United States Circuit Court of Appeals for the Second Circuit.

No. 83, October Term, 1915.

Argued December 9, 1915. Decided January 11, 1916.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DE GRESAC MAUREL, and G. SCHIRMER, INC., Claimants-Appellants,
against
THE SHANLEY COMPANY, Defendant-Appellee.

Appeal from the District Court of the United States for the Southern District of New York.

Before Lacombe, Coxe and Rogers, Circuit Judges.

Nathan Burkan, Of Counsel for Appellants;
Gilbert, Lauterstein & Gilbert, Solicitors for Respondents,
Francis Gilbert, Of Counsel.

This cause comes here on appeal from a decree of the United States District Court for the Southern District of New York dismissing the bill of complaint.

The facts are stated in the opinion.

73 ROGERS, *Circuit Judge:*

This was a suit brought to protect a copyright. It is alleged that on April 2, 1913, G. Schirmer, Inc., having been duly authorized by the authors to do so, copyrighted a dramatico-musical composition entitled "Sweethearts;" and that the right to copyright the composition was granted subject to the condition that the performing right should belong to the other complainants who were the authors of the composition. Thereafter a separate copyright was taken out by G. Schirmer, Inc. of the vocal number "Sweethearts." This second copyright is upon words and music which are a component part of the previously copyrighted dramatico-musical composition similarly entitled. It is alleged to be the leading vocal number of the composition and the success and popularity of that opera is said to be largely due to this particular vocal number.

Those of the complainants in whom is vested the performing right in this dramatico-musical composition entered into an agreement with certain theatrical managers and producers to perform it upon the public stage and preparations were made for its extensive production, sceneries, costumes, accessories and other paraphernalia being provided. Artists were secured to render it and booking contracts were entered into for its public performance in a theatre in New York City, and it has been so performed for a considerable period. It is claimed that the composition has been a great financial and artistic success and has attained great popularity with the public.

The defendant company maintains a restaurant and place of public entertainment in New York City, and is said in the complaint to have caused the separately copyrighted song to be sung by professional singers upon a stage in the dining hall on its premises, accompanied by an orchestra and it is charged that it proposes to continue the unlawful and wrongful performance. And the complaint avers that the vocalists and orchestra are engaged by the defendant to perform and play upon the premises for compensation; that these performances are open to the public and are not given for a
74 charitable, religious or educational purpose but for the purpose of defendant's business and as part of the service rendered to the patrons of its establishment and who purchase and partake of refreshments; that this use of the song is without the permission of the complainants and against their will and amounts to an infringement of the copyright; that the rendering of the song is a part of a theatrical entertainment given by the defendant upon its premises for the entertainment and amusement of its patrons, and for the purpose of attracting them; that the performers are under the pay of the defendant and that the entertainment thus offered to the public costs the defendant $1,000 each week.

The answer admits that the defendant through its servants and employees caused to be sung in its restaurant the vocal selection known as "Sweethearts." It states that the song is published in sheet music form, and published and sold separately and not as a part of any dramatico-musical composition. It admits that the persons singing the song receive compensation therefor from the defendant. It avers that no charge for admission is made to the patrons of its restaurant or for the privilege of listening to any performance of music therein; that no additional charge is made for meals furnished in the restaurant at the time when such music is performed over the charge made when no music is performed; that the musical composition mentioned in the complaint is not performed by the defendant or caused to be performed by it publicly for profit; that the musical composition entitled "Sweethearts" is published in sheet music form and copyrighted separately and apart from any dramatico-musical composition and as so published was offered for sale and sold to defendant and the public generally; that by virtue of its purchase of the song so published and sold defendant was authorized to cause the same to be performed in its restaurant in the manner stated. The answer was accompanied by an affidavit made by the

secretary of the defendant company. It appears from that that in the restaurant is erected a platform on which an orchestra is seated at certain hours of the day during which a musical program is
75 given for the benefit of the patrons; this platform is not a stage and has none of the appurtenances that are necessary parts of a stage; no foot lights, side lights, border light, scenery, wings, curtain or flies; no theatrical performance is given on the premises; none of the singers who appear ever appear in any costume other than the ordinary conventional evening dress costume; none of the songs that are sung are ever sung in character. The musical entertainment is only given during limited hours; from about noon to two P. M., and from six until about 1:30 A. M. the orchestra plays, and at intervals during that time singers appear who sing various selections of a diversified character.

The sheet music of the copyrighted song is in the record. It is entitled "Sweethearts—Waltz-Song from the Comic Opera 'Sweethearts.'" There is, however, nothing on its face which shows that the Comic Opera from which it was taken was itself copyrighted.

We have to consider therefore what the law is which is applicable to this state of facts. The concrete question is whether the singing of the separately copyrighted song "Sweethearts" in a restaurant to which the public is admitted without charge infringes the complainant's copyright for the dramatico-musical composition "Sweethearts" owned by the complainants, there being nothing on the copyrighted song to show that the dramatico-musical composition from which the song was taken was itself copyrighted.

In 1831 Congress repealed the Acts of 1790 and 1802 and embodied in one statute the law relating to copyright. The Act of 1831 for the first time expressly provided for the copyrighting of musical compositions. The Copyright Act of 1909, being the law now in force and under which the complainants took out their copyright, expressly authorizes the copyright of: Dramatic or dramatico-musical compositions, and of musical compositions.

The Act gives the author of any dramatic or dramatico-musical composition who takes out a copyright thereon two distinct and separable rights. It gives him:

76 1. The sole right to print and sell copies of the words and music, and

2. The sole right to publicly perform it.

And it gives the author of a musical composition in like manner two separable rights:

1. The right to print and sell copies of the words and music:

2. The right to perform the copyrighted work publicly for profit.

The distinction therefore exists that in the case of the dramatico-musical composition the Act secures to the author the sole right to publicly perform it without reference to whether it is performed for profit. But in the case of the musical composition, so far as performance is concerned, the Act restricts the authors' exclusive right to public performance for profit.

This court has held in John Church Company v. Hilliard Hotel Company, 221 Fed., 229 (1915) that the copyright to a certain mu-

sical composition is not infringed where the music is publicly rendered in the dining room of a hotel, which is open to the guests without charge for admission. We construed the language of the Act giving to the copyright proprietor the exclusive right "to perform the copyrighted work publicly for profit if it be a musical composition," to be limited to performances where an admission fee or some direct pecuniary charge is made. We there said:

"It does not make a performance any less gratuitous to an audience because some one pays the musician for rendering it, or because it was a means of attracting custom, or was a part of the operation of the hotel."

It follows therefore that the copyright of the song publicly rendered in defendant's restaurant under the circumstances heretofore stated did not infringe the copyright secured upon that composition, assuming that a valid copyright was obtained. The conclu-
77 sion that there was no infringement makes it unnecessary to inquire whether a subsequent copyright can be obtained upon a portion of a previously copyrighted work. We express no opinion on that question.

This brings us to inquire whether the complainants can claim protection for this song under their prior copyright of the dramatico-musical composition from which it has been taken. The copyright of a dramatico-musical composition secures to the proprietor, as already stated, the exclusive right of performance, and it makes no difference whether the performance is or is not for profit. Did the complainants by publishing and copyrighting the song separately and apart from the previously copyrighted dramatico-musical composition of which it was a part lose as to the part so published the benefit of its copyright as a dramatico-musical composition? There can be no doubt that they have lost that right as to the republished part for the reason that in republishing they failed to state that the comic opera from which the song was taken was itself copyrighted. We have failed to find any such announcement printed on the music sheets of the song. In its absence the complainants cannot claim the benefit of the prior copyright. Whether if they had inserted a notice of the previous copyright they could have retained the advantages of it as to the republished song, we need not now consider.

The conclusions to which we have come are:

1. That complainants cannot claim the benefit of the copyright of the dramatico-musical composition for that portion of the composition which they republished separately and without notice of the copyright previously obtained.

2. That the copyright of the song "Sweethearts" as a separate musical composition, even if valid, is not infringed by its being rendered in a public restaurant where no admission fee is charged, although the performer is privately paid for rendering it by the proprietor of the resort.

Decree affirmed.

78 At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 21st day of January, one thousand nine hundred and sixteen.

Present:

Hon. E. Henry Lacombe,
Hon. Alfred C. Cox,
Hon. Henry Wade Rogers,
Circuit Judges.

VICTOR HERBERT et al., Complainants-Appellants,
vs.
SHANLEY COMPANY, Defendant-Appellee.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is affirmed with costs.

E. H. L.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

79 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Victor Herbert vs. Shanley Co. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 21, 1916. William Parkin, Clerk.

80 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 79 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Victor Herbert et al., against Shanley Company, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 17th day of February in the year of our Lord One Thousand Nine Hundred and sixteen

and of the Independence of the said United States the One Hundred and fortieth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

[United States Internal Revenue Documentary Stamp, Series of 1914, ten cents, canceled W. P.]

81 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which Victor Herbert, Harry B. Smith, Robert B. Smith, Fred de Gresac Maurel and G. Schirmer, Inc., are appellants, and The Shanley Company is appellee, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Southern District of New York and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States,—

82 Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act therein as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the fourteenth day of April, in the year of our Lord one thousand nine hundred and sixteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 25,207. Supreme Court of the United States, No. 924, October Term, 1915. Victor Herbert et al. vs. The Shanley Company. Writ of Certiorari.

83 In the Supreme Court of the United States, October Term, 1915.

No. 924.

VICTOR HERBERT et al., Petitioners,
vs.
THE SHANLEY COMPANY.

Stipulation as to Return to the Writ of Certiorari.

It is hereby stipulated by counsel for the parties to the above entitled cause that the certified copy of the transcript of the record now

on file in the office of the clerk of the Supreme Court of the United States shall constitute the return of the the Clerk of the United States Circuit Court of Appeals for the Second Circuit to the writ of certiorari granted herein.

WM. J. HUGHES,
Counsel for Petitioners.
NATHAN BURKAN,
Counsel for Petitioners.
GILBERT, LAUTERSTEIN & GILBERT,
A. S. GILBERT,
Counsel for Respondents.

84 To the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari herein.

Dated New York, April 22nd, 1916.

[Seal of United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

85 [Endorsed:] 924/25207. United States Circuit Court of Appeals, Second Circuit. Victor Herbert et al. v. Shanley Company. Return to Certiorari.

86 [Endorsed:] File No. 25,207. Supreme Court U. S. October term, 1915. Term No. 924. Victor Herbert et al., Petitioners, vs. The Shanley Company. Writ of certiorari and return. Filed May 8, 1916.